SARAH JOANNE GREENBERG

DARN YOUR SOX: EXPLORING RETROACTIVE APPLICATION OF EXTENDED STATUTES OF LIMITATION AND REPOSE IN SECURITIES FRAUD LITIGATION

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I. PERPLEXING CHANGES IN SECURITIES LAWS

For the past several decades, Congress and the Supreme Court have been fighting a great tug of war over securities fraud litigation, particularly claims made under Section

10(b) of the Securities Exchange Act of 1934.[1] On July 30, 2002, President Bush signed into law the Accounting Reform and Investment Protection Act, more commonly known as Sarbanes Oxley (SOX), and set the stage for the latest battle in the securities-litigation tug of war.[2]

Financial scandals involving WorldCom, Qwest, Tyco, and Enron eventually cost shareholders around $460 billion.[3] After the devastating collapse of these corporate giants, the government needed something to restore investor confidence in publicly traded companies, and SOX was born.[4] Introduced by Democratic Senator Paul Sarbanes of Maryland, the SOX Act and amendments to the Securities Exchange Act of 1934 created several mandatory changes in the operations of publicly traded companies.[5]

This Comment focuses specifically on changes SOX made with regard to securities fraud litigation.[6] One of these changes amended Title 28, Section 1658 of the United States Code to establish a longer statute of limitations, as well as, a longer statute of repose for securities fraud claims under Section 10(b) of the 1934 Act.[7] Congress extended the one year statute of limitations, applicable from the time of the discovery of fraud, to two years and the three year statute of repose, applicable from the time of the violation, to five years.[8] The amendment, Section 804 of SOX, also noted the effective date of the longer statutes of limitation and repose.[9] Section 804(b) states it "shall apply

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[1] *See generally* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (analyzing a violation of the constitutional separation of powers created by the enactment of section 27A the Federal Deposit Insurance Corporation Improvement Act of 1991, 105 Stat. 2236 (1991)).

[2] 15 U.S.C § 7201 (2002).

[3] John Paul Lucci, *Enron--TheBankruptcy Heard Around the World and the International Ricochet of Sarbanes - Oxley*, 67 ALB. L. REV. 211, 212 (2003).

[4] *See* Bruce Vanyo, Stuart Kagan & John Classen, *The Sarbanes-Oxley Act of 2002: A Securities Litigation Perspective*, 1332 PLI/Corp 89, 120 (2002).

[5] *See id.* at 94 ("The Act fundamentally alters oversight of public company accounting. It institutes a host of new criminal and civil penalties against companies and management centered on proper accounting. The Act alters the way companies manage their documents").

[6] *See* discussion *infra* Parts II, III, IV, V, VI.

[7] *See* In re Heritage Bond Litig., 289 F.Supp.2d 1132, 1147 (2003). Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,
> or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (2000).

[8] 28 U.S.C. § 1658 (2005).

[9] *Id.*

to all proceedings addressed by this section that are commenced on or after the date of enactment of this act."[10] Immediately, investors filed claims previously time barred before the introduction of SOX, and a handful of courts were forced to decide whether these claims could be heard.[11]

The question of whether an amended statute of limitations revives previously time-barred claims is not a new issue in securities fraud litigation.[12] The issue has volleyed between Congress and the judiciary in a kind of legal tennis match for the past few decades.[13] The question of retroactivity with reference to SOX presents much confusion.[14] Due to political pressures, the SOX legislation flew through Congress.[15] The Act has been criticized as hastily passed and poorly drafted.[16] It is an open question whether SOX applies retroactively.[17] It was written imperfectly and subject to what has been considerable litigation.[18] "Even if a longer statute of limitations period is warranted . . . [i]t is inconsistent with express statutes of limitation already contained in the federal securities laws and is likely to create significant interpretational difficulties for courts."[19]

The first two courts to decide if the extended statute of limitations revived previously time-barred claims held in opposite manners.[20] More claims came forward to press the issue, but the few courts that addressed it found themselves mired in confusion

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> A period of limitations bars an action if the plaintiff does not file suit within a set period of time from the date on which the cause of action accrued. In contrast, a period of repose bars a suit a fixed number of years after an action by the defendant.

Quakk v. Dexia, 357 F.Supp.2d 330, 337 (D. Mass. 2005) (quoting Beard v. J.I. Case Co., 823 F.2d 1095, 1097 n.1 (7th Cir. 1987)).

[10] Pub. L. No.107-204, § 804(b), 2002 U.S.C.C.A.N. (116 Stat.) (to be codified at 28 U.S.C. § 1658).

[11] *See In re Heritage*, 89 F. Supp.2d at 1132.

[12] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 211 (1995).

[13] *See generally id.* (analyzing a violation of the constitutional separation of powers created by the enactment of the Federal Deposit Insurance Corporation Improvement Act of 1991, 105 Stat. 2236 (1991)).

[14] Michael A. Perino, *Statute of Limitations Under the Newly Passed Sarbanes-Oxley Act*, N.Y.L.J at 4, Aug. 2, 2002.

[15] *See* Vanyo, *supra* note 4, at 120.

[16] Perino, *supra* note 14 at 4.

[17] Richard B. Schmitt, Michael Schroeder & Shailagh Murray, *Corporate Oversight Bill Passes, Eases Path for Investor Lawsuits,* WALL ST. J., July 26, 2002, at A1.

[18] *Id*.

[19] Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 693 (2002).

[20] *Compare* In re Heritage Bond Litig., 289 F.Supp 2d 1132, 1148 ("[The amended statute of limitations] cannot apply to claims already barred at the time of its enactment, regardless of the filing date.") *and* Roberts v. Dean Witter Reynolds, Inc., 2003 WL 1936116 at 3 (M.D.Fla.) ("The section by its plain terms, applies to any and all cases filed after the effective date of the Act, regardless of when the underlying conduct occurred").

due to the language of the Act.[21] Guided by a test the Supreme Court developed in *Landgraf v. USI Film Products*, courts across the country worked to determine if the statute applied retroactively.[22]

This Comment clarifies the issues presented by the SOX statute of limitations and analyzes the current case law on the subject.[23] Part II of this Comment provides a historical background to securities fraud legislation and litigation and endeavors to shed light on the back and forth play between the legislature and judiciary involving securities fraud claims, specifically claims made under Section 10(b) of the Securities Exchange Act of 1934.[24] Part III introduces and examines the existing method used to determine when retroactive application is permissible.[25] Part IV explores the effect of the current methodology when applied to the SOX statute of limitations by surveying the existing case law on the subject, and Part V carries this analysis to its logical conclusion by presenting arguments in favor of retroactive application.[26] Finally, and foremost, the Act remains highly significant and holds many future implications for the courts, including the U.S. Supreme Court.[27] For the reasons set forth below, the courts should hold in favor of retroactive application and mend the holes their peers have worn into SOX through improper use.[28]

II. A BRIEF HISTORY OF SECTION 10(B) SECURITIES FRAUD LITIGATION

A. The Securities Exchange Act of 1934

Congress responded several decades ago to the stock market crash of 1929 by enacting the Securities Exchange Acts of 1933 and 1934 much the same way they responded to the devastating collapse of Enron and WorldCom by enacting SOX.[29]

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[21] *Compare* Friedman v. Rayovac Corp., 295 F.Supp.2d 957, 976 (2003) (holding a claim filed after the effective date adding a party to a time-barred claim filed before the effective date of the Act called for the application of the amended statute of limitations) *and* Glaser v. Enzo Biochem, Inc., 303 F.Supp 2d 724, 734 (2003) (holding the statute of limitations applied to actions that may have accrued, but not actions that were previously time barred).

[22] A.I.G. Asian Infrastructure Fund, L.P. v. Chase Manhattan Asia, Ltd., J.P., 2004 WL 3095844 (S.D.N.Y.); In re Royal Ahold N.V. Sec. & ERISA Litig., 351 F.Supp.2d 334, 334 (2004) (citing Landgraf v. USI Film Prods., 511 U.S. 244 (1994)).

[23] *See* discussion *infra* Parts II - VI.

[24] *See* discussion *infra* Part II.

[25] *See* discussion *infra* Part III.

[26] *See* discussion *infra* Parts IV, V.

[27] *See* discussion *infra* Part V-VI.

[28] *See* discussion *infra* Part VI.

[29] *Compare* Lucci, *supra* note 3, at 212 (describing the financial concerns that triggered the enactment of SOX), *and* Peter J. McCarthy, *The Constitutionality of Section 27A of the Securities and Exchange At of 1934: Congressional Response to the Upheaval of the Lampf decision*, 20 J. Legis. 235, 238 (1994) (describing the financial concerns which triggered the enactment of the Securities Exchange Acts of 1933 and 1934).

> The 1929 crash in a large part occurred due to speculation associated with the value of stock. Through various fraudulent schemes, the entire stock system, as it existed, collapsed in 1929. To prevent another crash, Congress acted swiftly and enacted two major regulatory acts in two years. The 1933 Act regulates the actions of corporations who issue stock. The 1934 Act is primarily concerned with regulating secondary resellers and requiring corporations to file periodic reports as to the condition and financial future of their corporations.[30]

Section 804(b) of SOX addresses claims made under Section 10(b) of the 1934 Act.[31] Significant debate exists as to whether the extended statute of limitations also applies to Sections 11 and 12(a) of the 1933 Act.[32]

This Comment primarily focuses on claims made under Section 10(b) of the Securities Exchange Act of 1934.[33] Section 10(b) addresses securities fraud claims brought about due to the employment of manipulative and deceptive devices.[34] Section 10(b) does not include a statute of limitations because Congress did not originally intend the rule to allow for private suits.[35] Courts interpreting Section 10(b) established an implied cause of action authorizing private litigants to pursue individual claims against companies who engage in acts that contravene Section 10(b).[36]

In the absence of an express statute of limitations for federal law claims, courts utilize the traditional practice of borrowing the law of the forum state to supply a statute of limitations period.[37] During 1980s, numerous insider trading scandals led to class-action lawsuits and multidistrict Section 10(b) claims.[38] The question of which state's statute of limitations to apply presented a complex problem, and the time came for the Supreme Court to clarify the issue.[39]

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[30] McCarthy, *supra* note 29, at 238.

[31] *Compare* Perino, *supra* note 14, at 4 (arguing that Section 804(b) of SOX may apply to claims under Sections 11 and 12(a) of the Securities Act of 1933 because a number of courts have found that claims brought under these sections "sound in fraud"), *and* John C. Coffee, Jr., *A Brief Tour of the Major Reforms in the Sarbanes-Oxley Act,* SH097 ALI-ABA 151, 174 (2002) (arguing that Section 804(b) of SOX does not apply to claims brought under Sections 11 and 12(a) because claims brought under these sections do not involve fraud, but rather a lesser claim of material nondisclosure).

[32] Perino, *supra* note 14, at 4.

[33] *See* discussion *infra* Parts III - VI.

[34] 15 U.S.C. § 78j(b) (2000).

[35] McCarthy, *supra* note 29, at 239.

[36] McCarthy, *supra* note 29, at 239. In *Kardon v. Nat'l Gypsum Co.*, 73 F. Supp 798 (E.D. Pa. 1947), a federal court ruled that the Securities Exchange Act of 1934 contained an implied right of action under Section 10(b). Joseph F. Morrissy, *Catching The Culprits: Is Sarbanes – Oxley Enough?*, 2003 COLUM. BUS. L. REV. 801, 810 (2003).

[37] McCarthy, *supra* note 29, at 239 (citing Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946)).

[38] McCarthy, *supra* note 29, at 239.

[39] McCarthy, *supra* note 29, at 240; *See also* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 352 (1991) (holding that state-borrowing principles should be applied to causes of action implied under a statute which also contains an express cause of action with an analogous statute of limitations).

B. The Supreme Court Sets a Uniform Statute of Limitations: Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson

1. Statutes of Limitations and Repose

Due to conflicting opinions among the Circuits and the complicated problem of choosing the proper limitations period for Section 10(b) securities fraud claims, the Supreme Court granted certiorari to address the important issue in *Lampf, Pleva, Lipkind, Purpis & Petigrow v. Gilbertson* (*Lampf*), a case arising out of the Ninth Circuit.[40] Justice Blackmun delivered the opinion of the court in which Justices Rehnquist, White, Marshall, and Scalia joined.[41] Relying on precedent, the Court employed a hierarchical inquiry to ascertain the appropriate limitations period for Section 10(b) claims.[42]

The inquiry applied by the Court requires three separate determinations.[43] First, the Court must determine whether the federal cause of action tends to encompass various, diverse topics and subtopics making it impossible to consistently apply one statute of limitations period within a jurisdiction.[44] Second, assuming a standardized limitations period was suitable, the Court must determine whether a state or federal source should provide this period.[45] Finally, keeping in mind that a presumption exists in favor of state borrowing, the Court must determine if there is an analogous federal source that affords a "closer fit" with the cause of action at issue than any state-law source.[46] The Court proceeded to apply the hierarchical inquiry to the Section 10(b) claim in question.[47]

In analyzing the claim before it, the Court determined with regard to the first question of the hierarchical inquiry that the use of differing state statutes would present the danger of forum shopping, and the interests of predictability and judicial economy called for the adoption of one, consistent source.[48] Answering the second and third questions of the hierarchical inquiry, the Court "conclude[d] that where, as here, the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period."[49] The statute of origin for Section 10(b) securities fraud claims is the Securities Exchange Act of 1934.[50]

The Securities Exchange Act of 1934 encompasses various provisions outlining multiple causes of action with differing statutes of limitation.[51] The Solicitor General, in

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[40] *Lampf*, 501 U.S. at 354.
[41] *Id*. at 351.
[42] *Id*. at 356.
[43] *Id.* at 357.
[44] *Id.* (citing Wilson v. Garcia, 471 U.S. 261, 273 (1945)).
[45] *Id*.
[46] *Id*.
[47] *Id*. at 359.
[48] *See id*. at 357.
[49] *Id*. at 359.
[50] *Id*. at 359-60.
[51] Jon B. Streeter & Peter E. Root, *An Overview of the Civil Liability Provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934*, *in* PRACTISING LAW

an amicus brief submitted on behalf of the Securities and Exchange Commission urged the Court to apply the five-year statute of repose incorporated into Section 20A of the Act by the Insider Trading and Securities Fraud Enforcement Act of 1988.[52] The Court disagreed with the Commission and determined instead that Section 9 of the Act pertaining to willful manipulation of securities prices was sufficiently analogous and more appropriately applied to Section 10(b) claims.[53] Section 9 of the Act states: "No action shall be maintained to enforce any liability created under this section, unless brought one year after discovery of the facts constituting the violation and within three years after such violation."[54] The Securities and Exchange Commission argued the adoption of the three year period of repose would frustrate the purpose of Section 10(b).[55] The Court, however, asserted that the inclusion of the one- and three-year arrangement in the broad collection of express securities actions included in the 1933 and 1934 Acts supports a congressional decision that the three-year period is adequate.[56] Claims made pursuant to Section 10(b) must therefore be initiated within one year of discovery and within three years after such violation.[57]

2. Retroactive Application

Apart from establishing statutes of limitation and repose for Section 10(b) securities fraud claims, *Lampf* produced substantial controversy by announcing without any analysis that these new statutes were to be applied retroactively to bar claims pending at the time of the decision.[58] The Court reversed the decision of the Ninth Circuit Court of Appeals regarding the particular Section 10(b) claim presented in *Lampf*.[59] While timely under Ninth Circuit authority, the respondents' claim was dismissed due to the statutes introduced by the Court upon review.[60] Justice O'Connor sharply criticized this result in her dissent stating: "In holding that respondents' suit is time barred under a limitations period that did not exist before today, the Court departs drastically from our established practice and inflicts an injustice on the respondents."[61] She argued precedent clearly and accurately demonstrated the case was not time-barred.[62]

INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES (No. B4-7094), at 460 (1995).

[52] *Lampf*, 501 U.S. at 355.

[53] *Id*. at 360.

[54] *Id*. (quoting 15 U.S.C. § 78i(e) (2005)).

[55] *Id*. at 362. The principle purposes of Section 10(b) include combating fraud and protecting investors. John L. Musewicz, *Vicarious Employer Liability and Section 10(b): In Defense of the Common Law*, 50 GEO. WASH. L. REV. 754, 777 (1982).

[56] *Lampf,* 501 U.S. at 362 (citing Ceres Partners v. GEL Assocs., 918 F.2d 329, 363 (2d Cir. 1990).

[57] *Id*. at 364.

[58] *See* McCarthy, *supra* note 29, at 240.

[59] *Lampf*, 501 U.S. at 364.

[60] *Id*.

[61] *Id*. at 369 (O'Connor, J., dissenting).

[62] *Id*. (O'Connor, J., dissenting).

In her dissent, Justice O'Connor cited several cases to support her argument including *Chevron Oil Co. v. Huson*.[63] In *Chevron*, the Court employed a method known as pure prospectivity.[64] According to the pure prospectivity methodology, "[t]he case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct or events occurring after the date of that decision."[65] *Chevron* also outlined three factors to consider when dealing with the non-retroactivity question: (1) Does the decision overrule clear past precedent, (2) does it retard the effect or purpose of the rule, and (3) does it produce substantial inequitable results?[66] Applying the *Chevron* factors, Justice O'Connor reasoned; first, the Court overrules plainly established circuit precedent.[67] Second, the Court makes clear that the federal interest in predictability requires a uniform standard, but to retroactively apply a statute of limitations period that the respondents could not have anticipated lacks predictability.[68] Third, inequitable results are obvious.[69] She condemned the fact that the Court chose to ignore the retroactivity issue, thereby unfairly burdening the respondents.[70]

The same day the Supreme Court announced its decision in *Lampf*, the Court also announced its decision in *James B. Beam Distilling Co. v. Georgia*.[71] In a plurality opinion, the Court held in *Beam* that once the Court has applied a new rule of law to litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata.[72] In his concurring opinion, Justice Scalia advanced the notion that the pure prospective methodology of *Chevron* was unconstitutional in the sense that it amounted to an advisory opinion, and that the concept of judicial review constrained the Court to consider only the case that was actually before it.[73] Though *Beam* was not relied upon by the majority in *Lampf*, several circuits later held *Beam* mandated retroactive application of the *Lampf* statutes of limitation and repose to Section 10(b) securities fraud claims.[74]

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[63] *Id*. at 373 (citing Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)) (O'Connor, J., dissenting).
[64] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 536 (1991).
[65] *Id*. (citing *Chevron*, 404 U.S. at 97 (1971)).
[66] *Chevron*, 404 U.S. at 106.
[67] *Lampf*, 501 U.S. at 373 (citing *Chevron*, 404 U.S. at 97) (O'Connor, J., dissenting).
[68] *Id*. (citing *Chevron*, 404 U.S. at 97) (O'Connor, J., dissenting).
[69] *Id*. (citing *Chevron*, 404 U.S. at 97) (O'Connor, J., dissenting).
[70] *Id*. at 374 (O'Connor, J., dissenting).
[71] *Compare id.* at 350 (announcing the Supreme Court's holding on June 20, 1991), *and* James B. Beam Distilling Co. v. Georgia , 501 U.S. 529, 529 (announcing the Supreme Court's holding on June 20, 1991).
[72] *Beam*, 501 U.S. at 544.
[73] *Id*. at 547 (Scalia, J., concurring opinion).
[74] McCarthy, *supra* note 29, at 244 (stating that the Second, Eighth, and Tenth Circuits held *Beam* mandated retroactive application of the *Lampf* statutes of limitation).

C. Congressional Response to Lampf

1. Statutes of Limitations and Repose

The Supreme Court holding in *Lampf* resulted in the dismissal of numerous private Section 10(b) actions against the ringleaders of major financial scandals including Charles Keeting, Michael Milken, and others.[75] Congress and the SEC believed these dismissals would negatively affect the enforcement process.[76] SEC chairman Richard Breeden endorsed a Senate bill that would overturn the *Lampf* decision and allow litigants more time to bring Section 10(b) claims in U.S. courts.[77] Breeden stated in a public address: "The Commission shares the concern of Justice [Anthony] Kennedy in his dissent [in *Lampf*] that an overly stringent statue of limitations may undermine investors' ability to recover damages for fraud under the Act."[78] Congress soon began to churn out new legislation with the hope of purging the devastating effects of *Lampf*.[79]

Democratic Senator Richard Bryan of Nevada introduced a bill that proposed a two-year statute of limitations and five-year statute of repose applicable to all judicially implied rights of action under the federal securities law.[80] Despite the call to action from individual members of the Senate and the SEC, Congress failed to reach a conclusive agreement and instead resolved the issue by creating a provision that overturned the *Lampf* decision.[81] The provision eventually passed as Section 476 of the Deposit Insurance Reform and Tax Payer Protection Act of 1991 and later became Section 27A of the Securities Exchange Act of 1934.[82]

2. Retroactive Application

Section 27A of the Securities Exchange Act, signed into law by President George H.W. Bush on December 19, 1991, eliminated the retroactive effect of the *Lampf* decision.[83] The pertinent part of Section 27A, 15 U.S.C. § 78aa-1(b), entitled effect on dismissed causes of action, provides:

> Any private civil action implied under 78j(b) of this title [§ 10(b) of the Securities Exchange Act of 1934] that was commenced on or before June 19, 1991- (1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

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[75] McCarthy, *supra* note 29, at 246 n. 110 (quoting 137 CONG. REC. H11, 811 (daily ed. Nov. 26, 1991) (Statement of Rep. Dingell)).
[76] McCarthy, *supra* note 29, at 247.
[77] 23 Sec. Reg. & L.Rep. (BNA) 1141 (July 26, 1991).
[78] *Id*.
[79] *See id*.
[80] *Id*.
[81] Erica Gann, *Judicial Action in Retrograde: The Case for Applying Section 804 of the Sarbanes-Oxley Act to All Fraud Actions under the Securities Laws,* 72 U. CIN. L. REV. 1043, 1053 (2004).
[82] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).
[83] *See id*.

> shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.[84]

Soon after Section 27A was signed into law, several litigants previously turned away due to the *Lampf* and *Beam* decisions filed motions to reinstate their previously dismissed claims.[85]

D. The Supreme Court Fires Back: Plaut v. Spendthrift Farm, Inc.

One of the many claims Section 27A(b) aimed to reinstate made its way to the Supreme Court from the United States District Court for the Eastern District of Kentucky as *Plaut v. Spendthrift Farms, Inc*..[86] The district court originally found the petitioners' claims untimely under the *Lampf* rule and dismissed them with prejudice.[87] The petitioners did not file an appeal, and the judgment became final thirty days later.[88] Upon the enactment of Section 27A, petitioners filed a motion to reinstate.[89] The motion met the conditions set forth in the Act, and therefore, the court was required to grant it.[90] Instead, the district court refused to reinstate the claim holding Section 27A(b) was unconstitutional, and the Supreme Court granted certiorari.[91]

After a lengthy historical analysis, Justice Scalia delivered the Court's majority opinion which held that Section 27A(b) violated the Constitution's separation of powers.[92] Justice Scalia rationalized that when retroactive legislation necessitates the application of new legislation to the final judgment of a formerly adjudicated case, it essentially reverses a determination previously made, in the case.[93] The decisions of Article III courts "are final and conclusive upon the rights of the parties."[94] Justice Scalia remarked upon the impudence of Congress in attempting to set aside final judgments by stating: "Apart from the statute we review[ed] today, we know no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed."[95] Perhaps discouraged by the decision in *Plaut*, Congress failed to act again regarding Section 10(b) securities fraud claims until the passage of SOX in 2002.[96]

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[84] 15 U.S.C. § 78aa-1(b) (2005).
[85] *See Plaut*, 514 U.S. at 215.
[86] *Id*.
[87] *Id*. at 214.
[88] *Id*. at 215.
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*. at 211.
[93] *Id*. at 225 (quoting The Federalist No. 81, at 545).
[94] *Id*. at 226 (quoting United States v. O'Grady, 89 U.S. 641, 647-48 (1875)).
[95] *Id*. at 230.
[96] *See* Gann, *supra* note 81, at 1054. It should be noted that in late December1995, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA) over a veto by President Clinton. William S. Learch, *Private Securities Litigation Reform Act 1995 – 1 ½ Years Later,* 1005 PLI/Corp 569 (1997). The act resulted in higher pleading

E. Congress Tries Again: The Sarbanes-Oxley Act

1. Statutes of Limitation and Repose

SOX, approved in response to the financial scandals predominantly embodied by the collapse of Enron, is possibly one of the most illustrious and comprehensive pieces of legislation passed in decades.[97] The Act was passed in a near unanimous vote by Congress, and President Bush quickly signed it into law calling it one of the "most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt."[98] Legislative history reveals that in addition to remedying corporate fraud, Congress intended the Act to overrule the 5-4 *Lampf* decision that established one- and three-year statutes of limitations and repose for Section 10(b) securities fraud claims.[99]

Section 804 of the Act sets out statutes of limitation and repose for "a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))."[100] Senator Patrick Leahy introduced Section 804 as part of Senate Bill 2010, the Corporate and Criminal Fraud Accountability Act.[101] The Section lengthens the judicially implied one- and three-year statutory scheme stating: These actions "may be brought not later than the earlier of— (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."[102] The justification offered for lengthening the statute of limitations was that an extended period would allow defrauded investors a better opportunity to recover losses in cases where those responsible for the fraud concealed it.[103]

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standards, automatic discovery, damage limitations, and a host of other procedural safeguards to prevent excessive securities fraud claims. *Id*. Most experts contend the presumption against retroactivity applies in the case of the PSLRA because the language of the act states: "The amendments made by title shall not affect or apply to any private action . . . commenced before and pending on [Dec. 22, 1995]." *Id*. (quoting Pub. L. No. 104-67, §108, 109 Stat. 737, 758 (1995)).

[97] *See* Gann, *supra* note 81, at 1043.

[98] Perino, *supra* note 19, at 671.

[99] S. REP. NO. 107-146, at 7 (2002) (statement of Sen. Leahy).

> As Justices O'Connor and Kennedy said in their dissent in [*Lampf*], the 5-4 Supreme Court decision … the current 'one and three' limitations period makes securities fraud actions 'all but a dead letter for injured investors who by no conceivable standard of fairness or practicality can be expected to file suit within three years after the violation occurred.

Id.

[100] 28 U.S.C. § 1658(b) (2005).

[101] S. REP. NO. 107-146, at 12 (2002).

[102] 28 U.S.C. § 1658(b) (2005).

[103] Perino, *supra* note 19, at 689.

2. Retroactive Application

The following passages explore the controversy surrounding the question of retroactive application of the extended statute of limitations to Section 10(b) securities fraud claims.[104] SOX passed swiftly and contained vital provisions added by floor amendments without hearings.[105] Many experts predicted that the Act would house several ambiguities and give way to unintended consequences.[106] Controversy developed around the following issues including, among other things, the introduction of professional standards for attorneys and the statute of limitations.[107] Recently, even one of the sponsors of the Act, Congressman Michael Oxley, commented that it was an imperfect document because it was hurried through in the "hothouse atmosphere" following the demise of WorldCom.[108] The speed with which the "corporate responsibility bill juggernaut"[109] raced through Congress did not bode well for future litigation.[110]

In a note to 28 U.S.C. § 1658, Section 804(b) of SOX established an effective date for the extended statute of limitations.[111] The note reads, "the limitations period provided by section 1658(b) of title 28, United States Code, as added by this section, shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act [July 30, 2002]."[112] Two distinct arguments arise due to the wording of this section.[113] Thus far, courts have almost consistently held that claims previously time barred under the old statutory scheme were not revived by the new

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[104] *See* discussion *infra* Parts IV-V.
[105] Coffee, *supra* note 31, at 171-72.
[106] Coffee, *supra* note 31, at 171-72.
[107] Coffee, *supra* note 31, at 171-72.
[108] Andrew Parker & Sundeep Tucker, *Sarbanes-Oxley Reforms 'Go Too Far', Says Author,* Financial Times (London, England), July 8, 2005, pg 6 (quoting Rep. Michael Oxley).
[109] Elisabeth Bumiller, *Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. Times, July 31, 2002, at A1.
[110] *See* Coffee, *supra* note 30, at 171-72.
[111] Pub. L. No.107-204, § 804(b), 2002 U.S.C.C.A.N. (116 Stat.) (to be codified at 28 U.S.C. § 1658).
[112] *Id*.
[113] *Compare* In re Enter. Mortgage Acceptance Co., 391 F.3d 401, 411 (2004) ("Congress did not clearly provide for retroactive application of Section 804 of Sarbanes Oxley."), *and* Brief of The Securities and Exchange Commission at 8, AIG Asian Infrastructure Fund, L.P. v. Chase Manhattan Asia Ltd, 2004 WL 3095844 (S.D.N.Y. 2004) (No. 02-CV-10034(KMW)) [hereinafter Brief] ("The Supreme Court and two courts of appeals have held that when Congress uses language like that found in Section 804(b), the new statute of limitations period not only applies retroactively to claims arising pre-enactment, but also revives barred claims.").

amended statutes.[114] Others have argued, Congressional intent found in the legislative history prescribes that the statute applies retroactively.[115] Some courts dissect the issue further claiming the language of the Act provides for limited retroactive application for the earlier of two years after discovery of the fraud or five years after the fraudulent conduct that occurred before enactment, emphasizing the importance of inquiry notice and discovery.[116] Clearly this presents a need for uniformity, but the pursuit of uniformity must not be attempted at the expense of justice.

III. RETROACTIVE ANALYSIS

Before addressing the confusion presented by the wording of Section 804 of SOX, it is proper to note that significant confusion exists in the concept of retroactivity in general and what constitutes retroactive effect.[117] Retroactivity is formally defined as encompassing two distinct concepts.[118] First, 'true retroactivity' entails the application of a new law to an act or transaction which was completed prior to the enactment of the new law.[119] Second, 'quasi-retroactivity' arises when a new law is applied to an act or transaction not yet completed at the time of enactment.[120] The following passages and the cases which analyze the issue explore the concept of true retroactivity with respect to Section 804 of SOX.[121]

Congress may constitutionally apply an extended statute of limitations period retroactively[122] In fact, Congress may even enact a new statute of limitations to revive claims barred under a prior rule.[123] But while Congress has this power, it must unambiguously state that the law applies retroactively.[124] The majority of courts determining the issue of retroactivity with respect to the statute of limitations amended by

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[114] *Enter. Mortgage*, 391, F.3d at 401; In re ADC Telecomm., Inc. Sec. Litig., 409, F.3d 974, 979 (8th Cir. 2005); Foss v. Bear Sterns & Co., Inc., 394 F.3d 540, 542 (7th Cir. 2005).
[115] Roberts v. Dean Witter Reynolds, Inc., 2003 WL 1936116 at 4.
[116] Tello v. Dean Witter Reynolds, Inc. 410 F.3d 1275, 1282-83 (11th Cir. 2005).
[117] *Compare* In re Enron, 2004 WL 405886 at 15 ("[A] statute does not have retroactive effect merely because it is applied to conduct occurring prior to its enactment."), *and In re ADC*, 409 F.3d at 978 ("[A]nytime new legislation applies to causes of action that have accrued prior to the enactment of the legislation, it has retroactive effect.").
[118] BLACK'S LAW DICTIONARY 1343 (8th ed. 2004).
[119] *Id*.
[120] *Id*.
[121] *See*, In re Enter. Mortgage Acceptance Co., 391 F.3d 401, 411 (2004).
[122] Int'l Union of Elec. Radio & Mach. Workers, AFL-CIO v. Robbins & Meyers, Inc., 429 U.S. 229, 244 (1976).
[123] Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311-12 (1945).
[124] Glaser v. Enzo Biochem, Inc., 303 F. Supp 2d 724, 734 (citing INS v. St. Cyr, 533 U.S. 289, 317 (2001)).

SOX applied a "three-step analysis" developed by the Supreme Court in *Landgraf v. USI Film Products*.[125]

A. The Three-Step Analysis: Landgraf v. USI Film Products

When a case involves a federal statute enacted following the incident in the suit, the Court introduced a three-step analysis in *Landgraf* for making a conclusion as to retroactivity (the three-step analysis).[126] First, a court must determine whether Congress has expressly provided for the statute's proper reach.[127] In *Landgraf*, the Court found the words "pending on or commenced after the date of enactment" to be a clear expression of Congressional intent for the statute to apply retroactively.[128] If Congress has done so, a court need not resort to the judicial default rules.[129] Second, if the statute contains no explicit rule, a court must resolve whether the new statute would have retroactive effect.[130] Several courts have described the second step of the three-step analysis "as an inquiry into whether the statutory change affects substantive or procedural rights."[131] Retroactive effect occurs when a newly enacted statute either, impairs the rights a party possessed when he acted, enhances a party's liability for past acts, or imposes new obligations with regard to transactions already completed.[132] Third, if the statute imposes retroactive effects, traditional presumptions dictate it does not apply absent clear congressional intent.[133]

Landgraf involved a sexual harassment challenge under Title VII of the Civil Rights Act of 1964.[134] Petitioner Barbara Landgraf claimed that while employed at a USI Film Products plant in Tyler, Texas, she suffered repeated harassment due to inappropriate remarks made by a fellow employee.[135] The district court dismissed the claim finding that Landgraf's employer had adequately remedied the situation.[136] While Landgraf awaited appeal, the President signed the Civil Rights Act of 1991 into law.[137] Section 102 of the Civil Rights Act contained provisions establishing a right to obtain compensatory and punitive damages for a violation of Title VII and allowed for a jury

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[125] In re ADC Telecomm., Inc. Sec. Litig., 409, F.3d 974, 979 (8th Cir. 2005); *Enter. Mortgage*, 391 F.3d at 405.
[126] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).
[127] *Id*.
[128] William M. Prifti, *Securities: Public and Private Offerings Database* updated September 2005*,* at 3 *available at* SECPUBPRIV S 11:34.50.
[129] *Landgraf*, 511 U.S. at 280.
[130] *Id*.
[131] In re Enter. Mortgage Acceptance Co., 391 F.3d 401, 411 (2004).
[132] *Landgraf*, 511 U.S. at 280.
[133] *Id*.
[134] *Id*. at 248.
[135] *Id*.
[136] *Id*.
[137] *Id. at* 249.

trial if these types of damages were asserted.[138] After introducing the above multipart test and analyzing the language of the Act accordingly, the Court determined the provisions of the new act did not apply retroactively to Landgraf's claim because Congress did not expressly prescribe retroactive application of Section 102.[139]

B. Working the Steps

The first step of the analysis seems rather straightforward, but courts differ in exactly what type of language expressly prescribes a statute's proper reach.[140] The statutory language at issue in *Landgraf* consisted of the following: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."[141] The Court found this language lacked the kind of unambiguous directive required to permit retroactive application and thus, turned to an analysis of the legislative history to ascertain congressional intent.[142] Congress originally attempted to pass the Act in 1990.[143] The language of the 1990 Act contained an express provision for retroactivity[144] The President vetoed the 1990 legislation, referring to the bill's "unfair retroactivity rules" as a basis for his disapproval.[145] Congress failed to override the veto, and instead introduced the 1991 legislation without the provision for retroactivity.[146] The fact that such language was noticeably absent from the 1991 Act cannot reasonably be attributed to ignorance of the retroactivity issue.[147] Rather, it appears more evident that the absence of the retroactive language resulted from a compromise that made it possible to enact the 1991 version.[148] Thus, one may argue the existence of clear

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[138] Jennifer R. Yelin, *Retroactivity Revisited: A Critical Appraisal of CERCLA's Retroactive Liability Scheme in Light of Landgraf v. USI Film Products and Eastern Enterprises v. Apfel,* 8 N.Y.U. ENVTL. L.J. 94, 110 (1999).
[139] *Id*. at 111.
[140] *Compare* Int'l Union of Elec. Radio & Mach. Workers, AFL-CIO v. Robbins & Meyers, Inc., 429 U.S. 229, 241-44 (1976) (holding that language stating "[t]he amendments made by this Act . . . shall be applicable with respect to all charges pending . . . on the date of enactment of this Act and all charges filed thereafter" applied to charges previously time barred and "provide[d] for retroactive application of the extended limitations period"), *and* In re Worldcom, Inc. Sec. Litig., 2004 WL 1435356 (S.D.N.Y.) (requiring explicit language and finding that "[t]here is no explicit language in the statute stating that is applies retroactively or that is operates to revive time-barred claims").
[141] *Landgraf*, 511 U.S. at 257.
[142] *Id*. at 255-56.
[143] *Id*. at 255.
[144] *Id*.
[145] *Id*. at 255-56 (quoting President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 6 Weekly Comp.Pres.Doc. 1632,1634 (Oct. 22, 1990), *reprinted in* 136 Cong. Rec. S16418, S16419).
[146] *Id*. at 256.
[147] *Id*.
[148] *Id*.

congressional intent against retroactive application of the Act, but the Court pushed on to the second step in the analysis.[149]

When turning to the second step in the three-step analysis, the Court advanced the notion that there is a deeply rooted presumption against retroactive legislation.[150] This deeply rooted presumption against statutory retroactivity developed due to the perceived unfairness implicit when imposing new burdens on parties after the fact.[151] In actuality, a contrary rule existed in common law that called for retroactive application of statutes that removed a burden from the parties.[152] The presumption against retroactivity conflicts with another well known axiom that the "court is to apply the law in effect at the time it renders its opinion."[153] If the Court applied this latter principle in *Landgraf*, the Act would apply retroactively to the claim.[154] Courts commonly find "apparent tension" amid differing canons of statutory construction.[155] Therefore, courts must determine if applying the statute retroactively leads to impermissible consequences.[156]

Impermissible consequences are found in every statute which impairs vested rights obtained under existing laws, or imposes a new duty or disability with respect to transactions which have already taken place.[157] The Court must ask whether the Act attaches new legal consequences to events that occurred prior to its enactment, but even the potential unfairness of applying civil legislation retroactively does not justify the Court's failure to give the statute its intended scope.[158] The Court in *Landgraf* determined that the provisions for punitive and compensatory damages set forth in the new Civil Rights Act, if applied retroactively, would impose a new disability and attach new legal burdens to conduct that occurred before the Act became effective.[159] These impermissible effects led the Court to hold that the Civil Rights Act of 1991 did not operate retroactively, and therefore, according to the third step of the analysis it did not govern petitioner Landgraf's claim due to the absence of clear congressional intent.[160]

Justice Blackmun found much at fault with the reasoning of the majority, and in his dissent, he argued the decision "extends the presumption against retroactivity beyond its historical reach and purpose."[161] Justice Blackmun believed the most natural reading of the statute and a straightforward textual analysis of the Act indicated that the

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[149] *See id*.
[150] *Id*. at 265.
[151] *Id*. at 270.
[152] *Id*. (citing United States v. Chambers, 291 U.S. 217, 223-24 (1934)).
[153] *Id*. at 264 (quoting Bradley v. School Bd. of Richmond, 416 U.S. 696 (1964)).
[154] *See id*.
[155] *Id*. at 263 (citing Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes are to be Construed,* 3 VAND. L.REV. 395 (1950)).
[156] *Id*. at 268-69.
[157] *Id*. at 269 (quoting Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648 (1789)).
[158] *Id*. at 269-70.
[159] *Id*. at 281-84.
[160] *Id*. at 286.
[161] *Id*. at 294 (Blackmun, J., dissenting).

provisions of Section 102 applied to cases pending on appeal at the time of enactment.[162] He too advanced a traditional canon of construction: "[T]he starting point for interpretation of a statute, is the language of the statute itself."[163]

IV. RETROACTIVITY AND SOX: AN ANALYSIS OF EXISTING CASE LAW

President Bush signed the SOX into law in the congressional election year of 2002.[164] Accused as sluggish in his response to financial scandals and motivated by plunging stock prices and concerns voters would hold him and fellow republicans accountable, many democrats pointed out that the President had been corralled into supporting the Act.[165] At the signing, the President remarked that "tricking an investor into taking a risk is theft by another name."[166] Many wondered, including Senator Tom Daschle, Democratic majority leader, why then had the Justice Department, as of yet, failed to indict executives at Enron nearly eight months after the corporation's bankruptcy.[167] Would private individuals likely wait as long to file civil claims, and if so, would the extended statute of limitations increase their chances of recovery? To which claims does the amended statute apply? Litigation over the scope of the new section was certain.[168] The United States District Court for the Central District of California issued the first opinion on the matter of retroactive application on January 6, 2003.[169]

A. Out of the Starting Gates: In re Heritage Bond Litigation

In re Heritage Bond Litigation involved an action against various defendants for making false and misleading statements in violation of Section 10(b) of the Securities Exchange Act of 1934.[170] Heritage Entities issued twelve bond offerings between the years of 1997 and 1999 for the purported purpose of establishing and maintaining Alzheimer's healthcare facilities, and as reflected in the Official Statement, the funds received from the sale of the bonds to investors were restricted solely to this purpose.[171] Instead, Heritage Entities, contrary to the terms of the Official Statements, shifted the proceeds of the bond offerings between several projects commingling and siphoning off the funds during transfer.[172] The projects themselves were not self-sustaining but instead kept afloat with the money earned from new offerings.[173] By 2002, the entire scheme

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[162] *Id*. (Blackmun, J., dissenting).
[163] *Id*. at 265 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 837 (1990)) (Blackmun, J., dissenting).
[164] 15 U.S.C. § 7201 (2002).
[165] Bumiller, *supra* note 106, at A1
[166] Bumiller, *supra* note 106, at A1
[167] Bumiller, *supra* note 106, at A!
[168] Coffee, *supra* note 30, at 174.
[169] In re Heritage Bond Litig., 289 F.Supp.2d 1132, 1147 (2003).
[170] *Id*. at 1135.
[171] *Id*. at 1137.
[172] *Id*. at 1139.
[173] *Id*. at 1140.

collapsed and Heritage defaulted on the repayment of the bonds defrauding investors of nearly $25 million.[174]

Plaintiffs filed the Section 10(b) claim prior to the passage of SOX, but then re-filled an essentially identical claim, after the President signed the Act into law.[175] The court began the task of interpreting which claims fell within the scope of the amended statute of limitations, remarking that the issue had not yet been addressed by the courts.[176] Without mentioning the three-step analysis established by *Landgraf*, or analyzing the effect of the Act on a claim not previously filed, the court quoted *Chenault v. United States Postal Service*, a Ninth Circuit decision, in holding that a newly enacted statute of limitations may not be applied retroactively to revive previously time-barred claims.[177] The plaintiffs' claim in *Heritage* expired according to the old three year statutory period before the enactment of Sarbanes Oxley.[178]

B. Retroactivity Lives: Roberts v. Dean Witter Reynolds, Inc.

Of the first cases to determine the issue of retroactivity with respect to Section 10(b) securities fraud claims, *Roberts v. Dean Witter*, remains one of the few to favor retroactive application.[179] In *Roberts*, the defendant, Morgan Stanley Dean Witter, filed a motion to dismiss due to the fact that the underlying fraud occurred in 1998 and the plaintiffs would have been barred from asserting the claim under the prior statutory scheme.[180] The plaintiffs argued the language of the Act was unambiguous and legislative history supported their contention that Congress meant the Act to apply retroactively.[181] The court, first looking to statute itself, concluded the language of the Act, standing alone, afforded redress for violations occurring before the date of enactment.[182] But noting that Congress did not specifically use the phrase retroactive application in the statute, the court turned next to examine the legislative history surrounding the passage of the Act.[183] The legislative history lent much credibility to the

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[174] *Id*.
[175] *Id*. at 1148.
[176] *Id*.
[177] *Id*. (quoting Chenault v. U.S. Postal Serv., 37 F.3d 535, 539 (9th Cir. 1994)) ("[A] newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would 'alter the substantive rights' of a party and 'increase party's liability")).
[178] *Id*.
[179] *Compare* Roberts v. Dean Witter Reynolds, Inc., 2003 WL 1936116, at 3 ("The section by its plain terms, applies to any and all cases), *with, e.g., Id.* at 1148 ("[The amended statute of limitations] cannot apply to claims already barred at the time of its enactment, regardless of the filing date").
[180] *Roberts*, 2003 WL 1936116 at 3.
[181] *Id*.
[182] *Id*.
[183] *Id*.

plaintiffs' argument.[184] The court focused on one particular statement by Senator Patrick Leahy: "[S]ection [804], by its plain terms, applies to any and all cases filed after the effective date of the Act, *regardless of when the underlying conduct occurred*."[185] The court denied defendant's motion to dismiss but granted an interlocutory appeal to determine the controlling question of law—whether SOX revives time barred claims.[186]

C. The Presumption Against Retroactivity Finds Overwhelming Support

As of the date of this Comment, no United States district court has held that SOX revives previously time-barred Section 10(b) securities fraud claims, and the federal circuit courts seem to be heading in the same direction.[187] The circuits that have decided the issue applied the three-step analysis and found an absence of clear congressional intent in the language of the Act.[188] The Second Circuit rendered the first appellate decision on the issue in *In re Enterprise Mortgage Acceptance Co*..[189] The Seventh and Eighth Circuits followed closely behind in their decisions in *Foss v. Bear Stearns & Co.* and *In re ADC Telecommunications*, *Inc*., respectively.[190]

1. The Second Circuit: In re Enterprise Mortgage Acceptance Co.

The appeal to the Second Circuit in *Enterprise Mortgage* involved cases arising from two different district courts.[191] The circuit court did not formerly consolidate the cases for appeal but heard them on the same day and resolved them together due to the substantially identical issues.[192] The cases involved Section 10(b) claims for allegedly misleading financial statements and private placements.[193] In both instances, the plaintiffs filed prior to the passage of SOX but following the enactment, appended additional claims and joined an additional defendant to take advantage of the extended statute of limitations.[194]

In applying the first step of the three-step analysis, the court concluded that the statute lacked the type of unambiguous language the Supreme Court has held would amount to an express retroactivity command.[195] The statute failed to use the terms

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[184] *See id.*
[185] *Id*. (quoting 148 Cong. Rec. S7418-01 (statement of Sen. Leahy) (emphasis added)).
[186] *Id*.
[187] Prifti, *supra* note 125, at 1.
[188] Prifti, *supra* note 125, at 2.
[189] In re Enter. Mortgage Acceptance Co., 391 F.3d 401, 401 (2004).
[190] In re ADC Telecomm., Inc. Sec. Litig., 409, F.3d 974, 974 (8th Cir. 2005); Foss v. Bear Sterns & Co., Inc., 394 F.3d 540, 540 (7th Cir. 2005).
[191] *Enter. Mortgage*, 391 F.3d at 403.
[192] *Id*.
[193] Prifti, *supra* note 125, at 2.
[194] *Enter. Mortgage*, 391 F.3d. at 403-04.
[195] *Id*. at 407.

"retroactive" or "revive."[196] The court also analyzed the wording of Section 804(c) which states: "Nothing in this section shall create a new, private right of action."[197] While admitting that the plaintiffs' argument that Section 804(c) was merely an expression that the statute of limitations was being enlarged without creating new types of claims was plausible, the court nevertheless concluded both the section setting forth the effective date, Section 804(b), and the section prohibiting the creation of new actions, Section 804(c) lacked clarity.[198] The court stated that "[t]he requirement of congressional clarity . . . must be met both in order to overcome the presumption against retroactive application and to obviate the need for proceeding to the second stage of the three-step [analysis]."[199] The plaintiffs continued to argue the second step of the three-step analysis, whether the statutory changes operated with retroactive effect, despite this determination by the court.[200]

In arguing the second step of the three-step analysis, the plaintiffs took the position that the extension of a federal statute of limitations is both procedural in nature and retroactive.[201] Relying on *Vernon v. Cassadaga Valley Central School District*, the plaintiffs asserted that retroactivity concerns generally do not bar the application of an extended statute of limitations.[202] *Vernon* concerned a claim brought under the Age Discrimination and Employment Act (ADEA).[203] Congress amended the statute of limitations applicable to filing a claim under the ADEA subsequent to the filing of the claim at issue.[204] The court in *Vernon*, relying heavily on *Landgraf*, determined the statute applied retroactively because the statute of limitations applied not to the primary conduct of the defendants, but instead, to the secondary conduct of the plaintiffs in filing the suit.[205] The statute when applied retroactively impaired no rights possessed by either party.[206] The court in *Enterprise Mortgage* disregarded this argument finding that a statute of limitations can be substantive or procedural in nature and refused to create a categorical exception to *Landgraf*.[207] The court considered the plaintiffs' failure to prove clear congressional intent in the first step of the analysis fatal to their appeal.[208] The

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[196] *Id*. at 406-07 (quoting Pub. L. No.107-204, § 804(c), 2002 U.S.C.C.A.N. (116 Stat.) (to be codified at 28 U.S.C. § 1658)).
[197] *Id*. at 407 (quoting Pub. L. No.107-204, § 804(c), 2002 U.S.C.C.A.N. (116 Stat.) (to be codified at 28 U.S.C. § 1658)).
[198] *Id*.
[199] *Id*.
[200] Prifti, *supra* note 125, at 2.
[201] Prifti, *supra* note 125, at 2.
[202] *Enter. Mortgage*, 391 F.3d at 408 (citing Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886, 890 (2d Cir. 1995)).
[203] *Vernon*, 49 F.3d at 888.
[204] *Id*.
[205] *Id*. at 890.
[206] *Id*.
[207] *Enter. Mortgage*, 391 F.3d. at 409.
[208] Prifti, *supra* note 125, at 2.

SOX amended statute of limitations would not revive previously time-barred claims filed in the Second Circuit.[209]

2. The Seventh Circuit: Foss v. Bear Sterns & Co.

The appeal to the Seventh Circuit in *Foss* involved a Section 10(b) claim against a securities broker for allegedly aiding and abetting the fraudulent concealment of an estate's securities committed by the administrator in probate court.[210] The court in *Foss* refused to analyze the retroactivity issue presented and merely remarked that the reasoning contained in the *Enterprise Mortgage* decision was persuasive.[211] Relying solely on the decision issued by the Second Circuit in *Enterprise Mortgage*, the Seventh Circuit held that the extended statute of limitations did not revive previously time-barred Section 10(b) securities fraud claims.[212]

3. The Eighth Circuit: In re ADC Telecommunications Co.

The appeal the Eighth Circuit in *ADC* involved a Section 10(b) claim alleging false and misleading statements made during the purchase of ADC stock.[213] The Plaintiffs filed the initial complaint following the passage of SOX, but both parties agreed that the cause of action accrued in the months prior to the enactment, making it time-barred under the old one- and three-year statutory scheme.[214] The court began the task of working through the three-step analysis, only after recognizing the deeply rooted presumption against retroactivity stating: "[E]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[215]

In the first step of the analysis, the court found that while the language in Section 804(b) of SOX was similar to the language endorsed by the Supreme Court as an explicit retroactivity command in *Landgraf*, Congress failed to include the words "pending on" found in the *Landgraf* statute.[216] The court reasoned that a literal reading of the Act would permit a puzzling result, allowing the revival of stale claims filed after the passage of SOX while barring stale claims filed prior to the date of enactment.[217] The fear of this result led the court to conclude the language created ambiguity as to the retroactive application of SOX.[218]

Next, advancing to the second step of the three-step analysis, the Eighth Circuit agreed with the decisions in *Chenault* and the Second Circuit in *Enterprise Mortgage*

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[209] *Enter. Mortgage*, 391 F.3d. at 410.
[210] Foss v. Bear Sterns & Co., Inc., 394 F.3d 540, 540 (7th Cir. 2005).
[211] *Id*. at 542 (citing *Enter. Mortgage*, 391 F.3d. at 410).
[212] *Id*. (citing *Enter. Mortgage*, 391 F.3d. at 410).
[213] In re ADC Telecomm., Inc. Sec. Litig., 409, F.3d 974, 975 (8th Cir. 2005).
[214] *Id*.
[215] *Id*. at 977 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)).
[216] *Id*. (quoting *Landgraf*, 511 U.S. at 265).
[217] *Id*.
[218] *See id*. 975.

holding that allowing the amended statute to revive stale claims would alter the substantive rights of a party.[219] Three circuit courts now found the extended statute of limitations established by SOX failed to revive previously time-barred claims.[220] These results seemed to indicate a growing consensus on the issue until the Eleventh Circuit, in a recently rendered opinion, indicated that it might permit the revival of stale claims.[221]

D. Retroactivity Reborn in the Eleventh Circuit: Tello v. Dean Witter Reynolds, Inc.

The interlocutory appeal granted in *Roberts* moved to the U.S. Court of Appeals for the Eleventh Circuit as *Tello v. Dean Witter Reynolds, Inc*. for the sole purpose of determining if the amended statute of limitations in SOX revived previously time-barred Section 10(b) securities fraud claims.[222] The plaintiffs originally filed their complaint in November of 2002, following the passage of SOX, alleging that defendant Dean Witter deceptively contrived market prices of a certain stock by engaging in a short squeeze to maintain artificially high prices.[223] The fraud occurred in 1998 making the action time barred under the original one-and three- year statute of limitations established by *Lampf*.[224] The court of appeals reviewed de novo analyzing the issue according to the three-step analysis.[225]

In applying the first step of the three-step analysis, the court determined that under a plain, facial reading of the Act, "there is built-in, limited retroactive application for the earlier of two years after discovery of the facts constituting securities fraud or five years after the fraudulent securities conduct that occurred prior to its enactment."[226] The court reviewed previous Supreme Court decisions that allowed the revival of expired claims under new, extended statutes of limitation with analogous language.[227] The *Tello* court refused to attach any significance to the to absence of the word pending that the Eighth Circuit found so persuasive and concluded that the temporal reach of the statute inherently included fraud that occurred prior to enactment.[228] They noted that the

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[219] *Id*.; Chenault v. U.S. Postal Serv., 37 F.3d 535, 539 (9th Cir. 1994) ("[A] newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would 'alter the substantive rights' of a party and 'increase party's liability.").

[220] Prifti, *supra* note 125, at 1-4.

[221] *See* Prifti, *supra* note 125, at 4.

[222] Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1276 (2005).

[223] *Id*. at 1277 ("A short squeeze is a situation when prices of a stock . . . start to move up sharply and many traders with short positions are forced to buy stocks . . . in order to cover their positions and prevent losses.").

[224] *Id*.

[225] *Id*. at 1281.

[226] *Id*. at 1279.

[227] *Id*. at 1279-82 (citing Int'l Union of Elec. Radio & Mach. Workers, AFL-CIO v. Robbins & Meyers, Inc., 429 U.S. 229, 242 (1976); Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs, 506 U.S. 153, 113 (1993)).

[228] *Id*. at 1279.

Supreme Court has "repeatedly recognized that securities laws combating fraud should be construed not technically and restrictively, but flexibly to effectuate [their] remedial purpose."[229] Because the court deemed the temporal effect of the statute obvious from its language, they did not advance to the second or third steps of the three-step analysis.[230]

The *Tello* court failed to issue a final opinion.[231] Instead, it remanded the case to the district court for a factual determination concerning when the plaintiffs had sufficient inquiry notice to file their claim.[232] The court explained that if the plaintiffs were sufficiently on inquiry notice prior to the enactment of SOX, the claim would be time barred under the old statutory scheme.[233] The district court has yet to make the determination, and the issue of whether the extended statutes of limitation established by SOX revive previously time-barred claims awaits resolution.[234]

V. ARGUMENTS IN FAVOR OF RETROACTIVE APPLICATION

A. The Language of Section 804(b) Expresses Congressional Intent for Retroactivity

The first step in the three-step analysis instructs courts to determine whether Congress expressly prescribed the statute's proper reach.[235] Section 804(b) of SOX states that the new statute of limitations applies to "all proceedings commenced on or after the date of enactment."[236] This statement amounts to a clear directive that the new limitations period applies to any claim filed after the enactment of SOX regardless of whether the claim was previously time barred.[237] The Eighth Circuit implicitly agreed that a literal reading of the statute would lead to such a result.[238] It refused, though, to apply the statute retroactively because it found this result puzzling.[239] It concluded that applying the statute according to its literal terms would lead to a discrepancy.[240] Namely, stale claims filed prior to enactment would not be revived, whereas claims filed on or after the effective date would be revived.[241] The Eighth Circuit acknowledged that this

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[229] *Id*. at 1287 (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 386-87 (1983)).
[230] *See id*. at 1282-83.
[231] *Id*. at 1295.
[232] *Id*.
[233] *Id*. at 1283.
[234] *See* Prifti, *supra* note 125, at 4.
[235] Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).
[236] Pub. L. No.107-204, § 804(b), 2002 U.S.C.C.A.N. (116 Stat.) (to be codified at 28 U.S.C. § 1658).
[237] *See* Roberts v. Dean Witter Reynolds, Inc., 2003 WL 1936116 at 4 (M.D.Fla.).
[238] In re ADC Telecomm., Inc., 409 F.3d. 974, 977 (2005) ("A literal reading of the Sarbanes-Oxley Act's effective-date clause would lead to a puzzling result.").
[239] *Id.*
[240] *Id.*
[241] *Id*.

discrepancy created the ambiguity and not the language of the statute itself.[242] In fact, the Eighth Circuit chose to ignore the language of the statute itself when it issued what amounted to a policy decision in *ADC*.

1. A Misstep on the First Step

To begin with, the first step of the three-step analysis does not call for courts to analyze the effects of the statutory language; rather, courts need only determine if Congress expressly prescribed the statute's proper reach.[243] Furthermore, the Supreme Court stated in *Landgraf* that: "[T]he potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope."[244] Not only did the Eighth Circuit choose to ignore Section 804's clear directive, it chose also to ignore the proper application of the three-step analysis established by the Supreme Court.[245]

Again, the first step of the three-step analysis requires courts to determine whether Congress has expressly provided for the statute's proper reach.[246] The second step inquires into retroactive effects, and finally, the third step, absent an express Congressional provision and due to the presence of impermissible retroactive effects, instructs that the judicial presumption against retroactivity applies.[247] In other words, the judicial default rules do not come into consideration until after the court has resolved the first step of the three-step analysis.[248] That determination must be made without reference to the presumption.[249] Many of the courts performing the three-step analysis with respect to Section 804 failed determine whether the plain language of the statute provided its proper reach before applying the judicial presumption against retroactivity.[250] The presence of the presumption during the analysis of the language must certainly prejudice the logic and conclusion reached by the court.[251] If the court begins its analysis with a preconceived notion that it should find against retroactive application, the court, due to that preconceived notion, holds the language to a stricter standard. Perhaps this explains the faulty conclusion reached by the Eighth Circuit in *ADC*.

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[242] *Id.* ("We find this discrepancy to create an ambiguity as to the retroactive application of the Sarbanes-Oxley Act.").
[243] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).
[244] *Id*. at 267.
[245] *See* In re ADC Telecomm., Inc., 409 F.3d. 974, 977 (2005).
[246] *Landgraf,* at 280.
[247] *Id*.
[248] Brief, *supra* note 110, at 14.
[249] Brief, *supra* note 110, at 14.
[250] *See In re ADC*, 409 F.3d at 977 (discussing the presumption against retroactivity before launching into a *Landgraf* multipart analysis).
[251] *See* Brief, *supra* note 110, at 14.

2. Similar Language Leads to Similar Results

Looking to prior decisions, the Supreme Court and two United States courts of appeals have previously held that language similar to the language found in Section 804(b) not only applies retroactively to conduct occurring pre-enactment, but also revives claims previously time barred.[252] These decisions involved statutes similar to Section 804(b) that failed to use the terms "retroactive" and "revive," but nevertheless, they were held to reinstate previously time-barred claims.[253]

For example, in *International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Robbins & Meyers, Inc.* (*Robbins Meyers*), the Supreme Court held the language "charges pending . . . on the date of the enactment of this Act and all charges filed thereafter" applied to all charges whether timely or not upon enactment.[254] The Court determined that the claim in *Robbins Meyers*, although untimely when filed, fell under the definition of pending and within the scope of the amended statute of limitations.[255] They explained their reasoning with the statement: "[The] reading of 'pending' confining it to charges still before the Commission and timely when filed is not the only possible meaning of the word."[256] In his majority opinion, Justice Rehnquist acknowledged that cases "filed and not yet rejected" were also encompassed by a logical interpretation of the word pending.[257] This acknowledgement leads one to the conclusion that the use of the pending language is not imperative in finding Congressional intent for retroactivity, and the absence of the word does not render the language of Section 804(b) ambiguous.[258]

Moreover, refusing to apply the amended statute of limitations to time-barred claims filed after the enactment of SOX directly contravenes the language of Section 804(b) that states it "shall apply to *all* proceedings . . . commenced on or after the date of enactment."[259] Again, the potential unfairness of applying civil legislation retroactively does not justify the Court's failure to give the statute its intended scope.[260] The conclusion that Section 804(b) does not revive stale claims would force a rather strained construction upon Congress' words.[261] Surely, Congress intended the expected implications of the language it chose.[262]

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[252] Brief, *supra* note 110.
[253] Brief, *supra* note 110.
[254] Int'l Union of Elec. Radio & Mach. Workers, AFL-CIO v. Robbins & Meyers, Inc., 429 U.S. 229, 242 (1976).
[255] *Id*. at 242-43.
[256] *Id*. at 242.
[257] *Id*. at 243.
[258] *Contra* In re ADC Telecomm., Inc., 409 F.3d. 974, 977 (2005) (finding that the Act failed to include the "pending on" language indorsed by *Landgraf*).
[259] Pub. L. No.107-204, § 804(b), 2002 U.S.C.C.A.N. (116 Stat.) (to be codified at 28 U.S.C. § 1658) (emphasis added).
[260] Landgraf v. USI Film Prods., 511 U.S. 244, 267, 269-70 (1994).
[261] *Cf*. Alabama Dry Dock Shipbuilding Corp. v. Sowell, 933 F.2d 1561, 1564 (11th Cir. 1991) (holding that language similar to that found in Section 804(b) amounted to an

3. Saving Section (c)

Several of the courts which analyzed the retroactivity issue remarked on the language contained in Section 804(c) of the Act which states: "Nothing in this section shall create a new, private right of action."[263] Most of these courts concluded that Section 804(c) precluded the revival of previously time-barred claims because that would create a new right of action.[264] The court in *Enterprise Mortgage* stated: "Where a plaintiff is empowered by a new statute to bring a cause of action that previously had no basis in law, a new cause of action has, in some sense of the word, been created."[265] Section 804(c), however, does not encompass the issue of retroactive application.[266]

Section 804(a) of SOX states that the new statute of limitations applies to claims of "fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws."[267] The legislative history indicates that "private right of action" refers only to rights of action expressly enacted by Congress or implied by the courts.[268] Senator Leahy observed, "[t]his provision states that it is not meant to create any new private cause of action but only to govern all the already existing private causes of action under the various federal securities laws that have been held to support private causes of action."[269] There is no support for the courts' decisions that Section 804(c) operates to preclude the revival of claims.[270] A literal interpretation of Section 804 of SOX clearly defines the temporal reach of the statute to include claims previously time barred under the old statutory scheme, and judicial precedent wholly supports that result.[271]

B. The Legislative History of Section 804 Supports Retroactivity

The Supreme Court fully expected other courts to examine the legislative history surrounding a statute in the first step of the three-step analysis set out in *Landgraf*.[272]

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explicit retroactivity command), o*verruled on other grounds by*, Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs, 506 U.S. 153, 153 (1993).

[262] *Cf. id.*

[263] *E.g.*, In re Enter. Mortgage Acceptance Co., 391 F.3d 401, 407 (2004).

[264] *E.g.*, *id*.

[265] *Id*. (citing Hughes Aircraft Co. v. U.S., 520 U.S. 939, 950 (1997)).

[266] Brief, *supra* note 110, at 27.

[267] Pub. L. No.107-204, § 804(a), 2002 U.S.C.C.A.N. (116 Stat.) (to be codified at 28 U.S.C. § 1658).

[268] 148 Cong. Rec. S7418, Legislative History of Title VIII of H.R. 2673: The Sarbanes-Oxley Act of 2002 (July 26, 2002) [hereinafter Legislative History].

[269] Legislative History, *supra* note 255.

[270] Brief, *supra* note 110, at 27.

[271] *See* Tello v. Dean Witter Reynolds, Inc.,, 410 F.3d 1275,1279 (2005).

[272] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 262(1994).

The *Landgraf* Court scrutinized the legislative history surrounding the Civil Rights Act of 1991 before holding the amended statute applied retroactively.[273] A great debate surrounds the use of legislative history in the interpretation of statutes, "but judges may legitimately consult materials like committee reports or floor statements in the search for intent where the language [of a statute] is ambiguous."[274] The legislative history surrounding Section 804 and SOX in general indicate Congress' intent that the amended statutes of limitation applied retroactively.[275]

The argument for retroactive application finds its chief support in the comments of Senator Leahy.[276] On the floor of the Senate, Senator Leahy stated with regard to Section 804 of SOX that, "[t]his section, by its plain terms, applies to *any and all* cases filed after the effective date of the Act, regardless of when the underlying conduct occurred"[277] The language "any and all" reinforces the conclusion that Section 804(b) shall apply to all proceeding filed after the enactment without exception.[278] If Senator Leahy contemplated an exception for previously time-barred claims, certainly he would have said as much. The phrase "regardless of when the underlying conduct occurred" plainly indicates that Congress intended the Section to apply to pre-enactment events.[279] Nowhere in the legislative history does it suggest Congress meant to distinguish between claims that had expired before the enactment and claims which had not yet expired upon enactment.[280] A plain, facial reading of Section 804 alone supports Congress' intent that the Act operates to revive previously time-barred claims, and the language of the statute taken in concert with the legislative history further reinforces this argument.[281]

C. Further Support for Retroactive Application

Courts often look to traditional canons of construction to aid in the interpretation of statutory language.[282] One such canon provides that statutes which are remedial in nature are to be liberally construed.[283] In fact, in 1969, the Supreme Court held that the language of Section 10(b) must be interpreted liberally in order to accomplish the "broad anti-fraud purposes of the statute."[284] A second traditional canon provides that "to effect

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[273] *See id*.
[274] Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 6 (1998).
[275] Brief, *supra* note 110, at 20.
[276] Legislative History, *supra* note 255.
[277] Legislative History, *supra* note 255 (emphasis added).
[278] Brief, *supra* note 110, at 20.
[279] Brief, *supra* note 110, at 20.
[280] Brief, *supra* note 110, at 20.
[281] *See* Brief, *supra* note 110, at 20.
[282] *See* Karl, N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons about How Statutes are to be Construed,* 3 VAND. L.REV. 395, 399 (1950).
[283] *See id.*
[284] Sec. and Exch. Comm'n v. Nat'l Sec., Inc., 393 U.S. 453, 467 (1969).

its purpose a statute may be implemented beyond its text."[285] In *U.S. v. Carlton*, the Supreme Court upheld Congress' power to remove a tax deduction retroactively, even when the tax-payer arranged his transactions in reliance upon the deduction.[286] The *Carlton* Court explained its reasoning rested in the fact that the holding was appropriate to effectuate the purpose of the statute and achieve its curative effect.[287] Taken together, these two traditional canons of construction and prior case law permit the retroactive application of Section 804. The legislative history states: "This legislation aims to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve the evidence of such fraud, and hold wrongdoers accountable for their actions."[288] The legislation clearly demonstrated a remedial nature. To effectuate the remedial purpose of Section 804, courts must allow the revival of previously time-barred claims in order to protect the victims of fraud and punish wrongdoers. Senator Leahy stated, "[t]here ought to be some way for the people who lost their pensions, lost their life savings, to get it back."[289] Allowing Section 804 of SOX to revive previously time-barred claims accomplishes that task.

One final argument in support of retroactive application of Section 804 rests in the concept that the revival of time-barred claims does not operate to impose impermissible retroactive effects. In his majority opinion in *Robbins Meyers*, Justice Rehnquist stated "certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment."[290] There are no vested rights in the running of a statute of limitations to prevent a remedy.[291] In his *Landgraf* dissent, Justice Blackmun stated: "There is no vested right to do wrong."[292] One traditional argument against the retroactive application of new legislation states that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and conform their conduct accordingly."[293] The Court in *Carlton* chose to ignore this argument, instead finding that the inequitable results were rationally related to achieving the legitimate remedial purpose and trumped any considerations of notice of the law.[294] Even if impermissible retroactive effects presented themselves in the retroactive application of Section 804, the impermissible effects would be justified in order to achieve the remedial purpose of the statute. Obviously, the vast majority of courts

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[285] *See id*.
[286] United States v. Carlton 512 U.S. 26, 35 (1994).
[287] *Id*. at 31.
[288] S. Rep. No. 107-146, at 2 (2002), available at 2002 WL 863249.
[289] 148 Cong. Rec. S6524-02 (July 10, 2002), *available at* 2002 WL 1474352 (Statements of Sen. Leahy).
[290] Int'l Union of Elec. Radio & Mach. Workers, AFL-CIO v. Robbins & Meyers, Inc., 429 U.S. 229, 24 3-44 (1976).
[291] Michael B. Dashjian, *The Prospective Application of Judicial Legislation*, 24 PAC. L. J. 317, 354 (1993).
[292] Landgraf v. USI Film Prods., 511 U.S. 244, 297 (1994) (Blackmun, J., dissenting).
[293] *Id.* at 265.
[294] *See* United States v. Carlton 512 U.S. 26, 35 (1994).

handling the retroactivity issue insist upon ignoring or misapplying the proper three-step analysis in favor of confusion and injustice.

VI. CONCLUSION

As the parties in *Tello* await a factual determination by the district court on the issue of notice, interested parties everywhere await a possible holding by the Eleventh Circuit allowing the retroactive application of Section 804 of SOX.[295] Retroactivity is not a new concept.[296] Until a few decades ago, the established understanding was that new legislation applied prospectively, and judicial decisions applied retroactively.[297] The Supreme Court's decisions on retroactivity in the legislative context have wavered between a flexible discretionary approach and a pragmatic adherence to judicial presumptions against retroactive application.[298] The modern Court has been consistently deferential to the concept of legislative retroactivity perhaps due to the "erosion of the doctrine of substantive due process."[299] The Court has yet to sufficiently clarify the issue of legislative retroactivity, and it is likely to be the focus of numerous decisions yet to come.[300]

The history of securities litigation in the United States illustrates the significance of the retroactivity issue.[301] Ever since the Supreme Court recognized an implied private right of action under Section 10(b), the multiple branches of government have been striving to establish the proper structure and scope of those claims.[302] Very often, the objectives of each work in opposition to each other.[303] Power struggles and policy consideration further frustrate any attempts for uniformity and simplicity.[304] The Supreme Court created a basic framework for retroactive analysis with its decision in *Landgraf*, but courts continue to abuse and misapply it.[305] Some courts choose to ignore it altogether.[306]

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[295] *See generally* Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1295 (2005) (remanding the case for a factual determination regarding the time of notice before deciding whether Section 804 of SOX revived the previously time barred claim).
[296] *See* Lyn S. Entzeroth, *Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of The Persistence, The Pervasiveness, And The Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 163 (2005).
[297] *Id.*
[298] Jill E Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1063 (1997).
[299] *Id*. at 1063-64.
[300] *See id*.
[301] *See* discussion *supra* Part II.
[302] *See* discussion *supra* Parts II-III.
[303] *See* discussion *supra* Part II.
[304] *See* discussion *supra* Parts II-IV.
[305] *See* discussion *supra* Parts IV-VI.
[306] *See* discussion *supra* Part V.

When SOX became effective in 2002, many experts anticipated the reemergence of the retroactivity issue.[307] The majority of decisions specifically concerning the SOX extended statute of limitations demonstrate an unwillingness of the courts to allow retroactivity.[308] This unwillingness cannot stand alongside the language and purpose of the Act, but the Eleventh Circuit remains the only court of appeals to recognize this truth.[309] While *Tello* signifies a step in the right direction, the tumultuous history of the issue indicates many additional steps are required for resolution.[310] Courts must permit retroactive application of the SOX extended statutes of limitation in order to achieve the Acts curative effect.

[307] *See* discussion *supra* Parts I-II.
[308] *See* discussion *supra* Part IV.
[309] *See* discussion *supra* Part V.